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RANGANATHAN BOOK SYMPOSIUM SYMPOSIUM

Ranganathan Book Symposium: Part 5

Response from the author

SURABHI RANGANATHAN — 8 April, 2016 Print 0

I am grateful to all participants of this symposium for their thoughtful and generous commentaries. The strange truth about book-writing, which I suppose all experienced hands know (and I discovered as a first-time author), is the void that follows once the manuscript is finished. The book then disappears into the publishing process, and gradually snakes on to the desks and reading lists of other scholars. The author might wait months to find out what others make of it. One does, of course, obtain feedback via talks and presentations, but written responses based on detailed readings represent another degree of engagement; and to receive this rich collection is a huge pleasure. Warm thanks

then to James Crawford, Jasper Finke, Jan Klabbers and Lea Wisken for their contributions, and to the editors of the Völkerrechtsblog, especially Valentin Jeutner, for organising the whole.

Before turning to the individual responses, I want to flag a common theme. The comments all rightly note that although strategically created treaty conflicts are described as the object of study, the underlying object of the book is to examine the relationship between international law and politics. The book, and the dissertation that formed its basis, emerged from my curiosity, even anxiety, about that relationship. I wanted to explore whether international law shapes politics, or is merely contingent upon state power and interest. Generations of international lawyers grappled with various versions of this question (as Finke notes). Presently (it seems to me) its poles are well-represented by two theses: first, that international law is simply an epiphenomenon, formally well-defined but irrelevant to the decision-making of powerful states; and second, that international law is a powerful, even constraining language, but, being no longer bound to form, susceptible to co-option. The book takes these theses as its starting point and, as Crawford notes (quoting Safrin), uses strategically created treaty conflicts as a 'Petri dish' in which to examine the dance of law and politics.

The question that follows – and that the responses touch upon – is whether my use of such conflicts is too instrumental. Do I skate too lightly over the definition of treaty conflict (Wisken); are my three case-studies genuinely, or even mainly, treaty conflicts (Klabbers); and how are treaty conflicts to be solved (Finke)?

Generously, the commentaries give me a pass on these questions, noting that I do engage with them, or ignore them for good reason. But raising these points is not only right, it is also astute. In writing the book, I was conscious that my decision to use strategically created treaty conflicts as context for an inquiry into the politics of international law presented challenges as well as benefits. The challenge was precisely the danger of treating such conflicts as a plot McGuffin, using them to carry forward the narrative, but not engaging with them on their own terms. Although I was careful to think about the book as offering dual analyses, of treaty conflicts *and* of the politics of international law, the very benefit that the former afforded as the context for the latter required giving up on some ideas – of formal definition and solution – so as to focus on how arguments that there was (or not) a legal impasse were constructed and broken down in practice.

Now, to the specific contributions. I am grateful to James Crawford for guiding the dissertation and the book manuscript, and of explaining its arguments so succinctly here. I found it very difficult to present my book in a similarly concise way, distilling its contributions while preserving nuances.

James offers perceptive insights into the choices made by the book: to single out one point, he rightly notes that it does not seek to prove or disprove constructivist assumptions about law's influence. Although I find constructivist theory interesting, I did not think I had the data or the methodological tools to state with certainty that what we saw in the three cases of treaty conflict was some form of state socialization at work. I presented material which may support that inference, but my interest remained

in identifying strands of constructivist thinking within mainstream legal scholarship; and in exploring how in particular contexts, some constraints followed as a consequence of invoking legal norms and practices (without going into whether this signified their internalization by political elites).

Jasper Finke offers several pertinent observations in his contribution. I will comment on three. First, the promise of formalism. Jasper correctly equates formalism to a kind of idealism: that 'law is impartial, impersonal and consistent in its application', it protects from the excesses of politics, and thus promotes 'a better and just world.' He is also right that this view of the law's promise underlies the faith in formalism that many international lawyers share (there are few amongst us who do not feel the pull of a culture of formalism, at least sometimes). But, is not the approach he describes conditioned upon a degree of satisfaction with the content of the law, which permits suspension of inquiry into the politics already embedded in it? Where the substance itself is not just, an impartial, impersonal and consistent application might – to take Fuller's approach – prevent the worst excesses, but it cannot entail just outcomes. This is not a new point, so I will not belabour it. Just briefly: where formalism does not satisfy, it is not because politics in the 'real world' does not allow it to flourish, but because it is a vehicle for some politics at the cost of others.

Jasper's second point is related. He asks whether my 'categorization of the existing literature – formalist, functionalist, and constructivist mainstream versus neo-realists and those committed to the idea of law as discourse' is 'too schematic.' I concede to (perhaps inevitable) schematization in using specific works as my starting point:

juxtaposing Goldsmith & Posner against Kennedy, for example. But I hope that the chapters on legal thought show that these categories break down when applied. The mainstream scholar, as I describe her, moves between formalism and functionalism. She accepts the idea of law as discourse and supports it because she further espouses liberal and constructivist assumptions of the promise of law. Taking this view, I do not inquire how these approaches individually address treaty conflicts.

Further, I agree with Jasper's reading of elements of formalism in my work, to the extent that it makes a distinction between treaty modification and interpretation within the limits of a specific treaty regime. Of course, every act of interpretation produces a change, but we know – are taught to recognise – the difference between 'plausible' and (for the want of a better word) 'creative' interpretations that stretch the meaning of a treaty, and depend upon additional factors. A strategically created treaty conflict may provide such an additional factor. I thus support Jasper's observation that 'strategically created treaty conflicts do not necessarily illustrate how political influence destroys the otherwise orderly functioning of law, but rather exemplify that the struggle over the meaning of law is part of law itself.' My aim was to show some of the texture of that struggle.

I owe much gratitude to Jan Klabbers. His book *Treaty Conflicts and the European Union*, published in early 2009, soon after I began my doctoral research, was a major influence on my dissertation, and thereafter on my book. His contribution offers an extremely perceptive identification of its themes – both overt and subliminal. I find his characterisation of the book's approach, as theoretically- or critically-informed doctrinal work, helpful; I am encouraged

that he considers it to offer an alternative to international relations approaches or social theory (although I do, of course, acknowledge being influenced by elements of both).

Jan's observations that power and politics should not be constructed monolithically, that the hero of one context may be the villain of another, and that law and politics combine in various ways to promote good, bad, and ugly outcomes are helpful points of reference for my current research, which examines the emergence of various – tragic and techno-utopian — imaginaries of the global commons, and particularly the deep seabed.

To take up one particular point from his contribution: the characterization of the three case studies as treaty conflicts. It is true that such characterization is a political act and (to some extent) a matter of perception. Other frames are indeed possible and sometimes plausible. The three examples, relating to the law of the sea, the International Criminal Court, and nuclear governance, may be viewed through prisms other than that of treaty conflict. The book concedes this in setting out its case for treating the three situations as treaty conflicts. The explanation in each instance is three-pronged: the characterization as treaty conflict is defensible; it is appropriate to the purposes of the book; and it is dictated by the fact that the relevant parties in each situation also seemed to embrace it (either saying as much, or implying it in their vehement denials). The third prong is the most important, for it was the parties' presentation/perception of a conflict of legalities that set off the dynamics that I describe for each situation.

Lea Wisken raises a related point. She asks why I do not offer a definition of treaty conflict, having criticized both strict

and liberal definitions. Like Jan, she generously goes on to answer the question, noting my suggestion that a conflict may be less a matter of definition, than perception and representation in practice. I would only add that of the two available definitions – strict and liberal – I am more comfortable with the latter, which is also the one espoused by the International Law Commission's Fragmentation study. As I recall, the ILC takes a view of treaty conflict that extends to situations where one treaty challenges the effective operation of another.

Lea, finally, refers to another methodological choice of the book. The book does not fully place the three conflicts within a comparative framework. Lea notes that a comparison could help isolate the precise impact of legal discourses on the treaty conflicts. In particular, I could have compared outcomes of treaty conflicts with and without strong legal discourses, or shown that only a legal discourses can explain an otherwise puzzling outcome. My omission to take this approach, coupled with the fact that all three cases show strong legal discourses and that the outcome in each can be described as the successful challenge of a multinational regime by a coalition of powerful states, could merely confirm the predictions of the 'hard-core realist International Relations scholar denying any relevance to International Law and legal discourses'.

Well, yes, perhaps. Certainly, a comparative approach seeking to isolate the impact of legal discourse would be a plausible way of proceeding with such a study. But, in my case, it was a conscious decision not to take this approach. I have reservations about the extent to which such comparative studies can really answer questions about the precise impact of 'law' as opposed to other factors, and as

also mentioned above, did not gather data for the purpose. I was more interested in showing (as Klabbers summarizes) that not only is the law intensely political, but also that the political is likewise intensely legal. Thus, I focus on the particular practices by which legality is invoked and made to do the work of politics, as well as the systemic 'baggage' that comes with the choice of using law, making certain moves and claims more plausible than others. I hope that the picture offered is ultimately more complicated than the simple subversion of multilateral regimes to the interests of powerful states.

Of course, none of this excludes the possibility (dominant for the realists) that a powerful actor might achieve its ends in complete disregard of the law; the world we live in offers constant reminders of the fact. However, my book embraces the even more dangerous reality that, in bleakest examples of what we like to call 'politics', what we see is not so much the law's subversion, as its utilization. The studies are offered in order to illuminate how, in which ways, and subject to what limits this can happen.

This post is rather longer than I had intended, and that is a testament to how much I enjoyed reading these contributions, and thinking through them. They provided me not just with commentaries on the book, but also questions and methodological choices that I will continue to reflect on in my research. And so, I want to end by once again thanking all the contributors for their terrific responses. I hope to remain in conversation even post this symposium.

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